No. 14547.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GORDON SCHINDLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant United States Attorney,
Chief of Criminal Division,

MANUEL L. REAL,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 14547.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GORDON SCHINDLER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

I.
STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California, on March 26, 1952 in ten counts under Section 1461 of Title 18, United States Code.

On May 19, 1952 the appellant was arraigned, entered a plea of Not Guilty to all counts of the Indictment, and the case was set for trial on January 13, 1953.

On January 13, 1953 appellant was tried in the United States District Court for the Southern District of California by the Honorable Harry C. Westover, sitting with

a jury, and was found guilty on Counts Five, Six, Seven, Eight, Nine and Ten of the Indictment. The jury was deadlocked on Counts One, Two, Three and Four.

On January 26, 1953 appellant's Motion for New Trial on Counts Five, Six, Seven and Eight was granted by the Honorable Harry C. Westover.

On February 9, 1954, appellant was retried in the United States District Court for the Southern District of California by the Honorable Leon R. Yankwich, sitting with a jury, and was found guilty on Counts One, Two, Three, Four and Six. [Tr. p. 5.][1]

On March 8, 1954 appellant was sentenced to a period of imprisonment of four months on Count One and was fined $1,000 on Count Two, and imposition of sentence was suspended on Counts Three, Four and Six, and the appellant placed on probation for a period of three years, the period of probation to begin upon the expiration of the sentence on Count One. [Tr. pp. 6-8.] Appellant appeals from this judgment.

The District Court had jurisdiction of this cause of action under Section 1461 of Title 18, United States Code and Section 3231 of Title 18, United States Code.

This Court has jurisdiction of the appeal under Section 1291 of Title 28, United States Code.

---

[1]"Tr." refers to "Transcript of Record."

II.
STATUTES INVOLVED.

The Indictment in this case was brought under Section 1461 of Title 18, United States Code.

The Indictment charges a violation of Section 1461 of Title 18, United States Code, which provides in pertinent part:

> "§1461. Mailing obscene . . . matter.
>
> "Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly deposits for mailing or delivery anything declared by this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both."

III.
STATEMENT OF THE CASE.

The Indictment pertinent to this appeal charges as follows:

> "Count One.
>
> [U. S. C., Title 18, Sec. 1461.]
>
> On or about March 8, 1951, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Gordon Schindler did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, certain books addressed to 'Broadway News 44 E. Broadway

Tucson, Ariz.' which books were obscene, lewd, lascivious, and filthy, as the defendant then and there well knew, and too obscene, lewd, lascivious, and filthy to be made a part of the records of this court.

COUNT TWO.

[U. S. C., Title 18, Sec. 1461.]

On or about March 14, 1950, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, a certain postal card addressed to 'P. B. Lindner 6338 E. Gallant Bell Gardens, Calif.' containing an advertisement and notice giving information where, how, from whom, and by what means obscene, lewd, lascivious, and filthy books might be obtained.

COUNT THREE.

[U. S. C., Title 18, Sec. 1461.]

On or about April 21, 1950, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, a certain postal card addressed to 'Waldo E. Trammel Box 670 North Bend, Ore.' containing an advertisement and notice giving information where, how, from whom, and by what means obscene, lewd, lascivious, and filthy booklets might be obtained.

COUNT FOUR.

[U. S. C., Title 18, Sec. 1461.]

On or about May 9, 1950, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, certain books addressed to 'Alfred Welles Lovelock, Nevada' which books were obscene, lewd, lascivious, and filthy, as the defendant then and there well knew, and too obscene, lewd, lascivious, and filthy to be made a part of the records of this court.

COUNT FIVE.

[U. S. C., Title 18, Sec. 1461.]

On or about August 24, 1951, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, a certain letter addressed to 'P. Bender Eminence, Ky.' containing advertisements and notices giving information where, how, from whom, and by what means obscene, lewd, lascivious, and filthy books might be obtained.

COUNT SIX.

[U. S. C., Title 18, Sec. 1461.]

On or about August 29, 1951, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post

Office Establishment of the United States, a certain letter addressed to 'Vernon L. Aldridge Box 423 Patagonia, Ariz.' containing advertisements and notices giving information where, how, from whom, and by what means obscene, lewd, lascivious, and filthy books might be obtained.

COUNT SEVEN.

[U. S. C., Title 18, Sec. 1461.]

On or about August 30, 1951, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, a certain letter addressed to 'G. Marston Scottsdale, Ariz.' containing advertisements and notices giving information where, from whom, and by what means obscene, lewd, lascivious, and filthy books might be obtained.

COUNT EIGHT.

[U. S. C., Title 18, Sec. 1461.]

On or about September 1, 1951, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did knowingly deposit and cause to be deposited, for mailing and delivery, in the Post Office Establishment of the United States, a certain letter addressed to 'H. T. Elliott Box 278 Dublin, Va.' containing advertisements and notices giving information where, how, from whom, and by what means obscene, lewd, lascivious, and filthy books might be obtained."

On May 19, 1952, the appellant appeared for arraignment and plea, represented by Caryl Warner, Esq., before the Honorable Ben Harrison, United States District Judge, and entered a plea of Not Guilty to all counts of the Indictment.

On January 13, 1953, the case was called for trial before the Honorable Harry C. Westover, United States District Judge, sitting with a jury, and on January 15, 1953, the jury returned a verdict of guilty as charged in Counts Five, Six, Seven, Eight, Nine and Ten of the Indictment. The jury was deadlocked on Counts One, Two, Three and Four.

On January 15, 1953, the Honorable Harry C. Westover, District Judge, declared a mistrial as to Counts One, Two, Three and Four.

On January 26, 1953, the Honorable Harry C. Westover, District Judge, granted appellant's Motion for New Trial as to Counts Five, Six, Seven and Eight. Appellant's Motion for New Trial as to Counts Nine and Ten was denied.

Appellant appealed Counts Nine and Ten in this Court in *Schindler v. United States,* decided November 30, 1953, and reported in 208 F. 2d 289. Petition for writ of certiorari was denied in the Supreme Court on April 5, 1954.

On February 9, 1954, the case was called for trial before the Honorable Leon R. Yankwich, sitting with a jury. Appellant was represented by Cecil W. Collins, Esq.

On February 10, 1954, the Honorable Leon R. Yankwich, District Judge, granted appellant's motion for judgment of acquittal on Counts Five, Seven and Eight.

On February 11, 1954, the jury returned a verdict of guilty as charged in Counts One, Two, Three, Four and Six of the Indictment.

On March 8, 1954, appellant was sentenced to imprisonment for a period of four months on Count One and to pay a fine of $1,000 on Count Two. Imposition of sentence was suspended on Counts Three, Four and Six and the appellant was placed on probation for a period of three years, the period of probation to commence upon the expiration of the sentence on Count One.

Appellant assigns as error the judgment of conviction on the following grounds:

A. The trial court erred in refusing to allow appellant's source books into evidence.

B. The trial court erred in refusing to admit the testimony of J. B. Tietz.

C. The trial court erred in its instructions on criminal intent.

D. Section 1461 of Title 18 is unconstitutional.

E. The verdict of the jury is (a) contrary to the law (b) contrary to the evidence and (c) contrary to the law and the evidence.

IV.
STATEMENT OF THE FACTS.

The facts pertinent to the appeal in this case are shown here in the form of Stipulation to Evidence entered into at the time of the trial by and between the Government and the appellant. [R. pp. 2-6.][2]

> "IT IS HEREBY STIPULATED AND AGREED by and between the United States of America, plaintiff and GORDON SCHINDLER, defendant in the above-entitled matter, through their respective counsel as follows:
>
> That it shall be deemed true and duly proved by the plaintiff, as follows:
>
> I.
>
> That on or about March 8, 1951, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER did, upon receipt of an order from Broadway News, deposit and cause to be deposited for mailing and delivery in the Post Office Establishment of the United States certain books addressed to 'Broadway News 44 E. Broadway Tucson, Ariz.' in an envelope, which books are entitled: 'Unusual Sex Practices,' 'Handbook for Husbands,' 'Auto-Erotic Practices,' 'Sex Perversion and the Law, Vol. I,' and 'Sex Perversion and the Law, Vol. II.'
>
> II.
>
> That on or about March 14, 1950, in Los Angeles County, California, within the Central Division of th Southern District of California, the defendant GORDON SCHINDLER, upon being solicited, deposited

---

[2]"R." refers to Reporter's Transcript of Proceedings.

and caused to be deposited for mailing and delivery in the Post Office Establishment of the United States a certain postal card addressed to 'P. B. Lindner, 6338 E. Gallant, Bell Gardens, Calif.' containing an advertisement and notice giving information where, how, from whom and by what means certain books might be obtained, to-wit: 'Handbook for Husbands' and 'Auto-Erotic Practices.'

III.

That on or about April 21, 1950, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER, upon being solicited, deposited and caused to be deposited for mailing and delivery in the Post Office Establishment of the United States a certain postal card addressed to 'Waldo E. Trammel, Box 670, North Bend, Ore.' containing an advertisement and notice giving information where, how, from whom and by what means booklets might be obtained, to-wit: 'Handbook for Husbands' and 'Auto-Erotic Practices.'

IV.

That on or about May 9, 1950, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant GORDON SCHINDLER, upon being solicited, deposited and caused to be deposited for mailing and delivery in the Post Office Establishment of the United States certain books addressed to 'Alfred Welles, Lovelock, Nevada,' which books are entitled: 'Handbook for Husbands' and 'Auto-Erotic Practices.' "

V.
ARGUMENT.

There Was No Error in the Refusal of the Trial Court to Allow Appellant to Introduce Into Evidence His Source Books.

Appellant herein cites as error the ruling of the trial court in excluding the books appellant claimed were the source for the books involved in the Indictment in this case. [R. pp. 33-34.]

The problem raised in this specification of error, therefore, can best be presented in the form of a question. Does the fact, if determined, that a source book, or a combination of source books, are not obscene, necessarily preclude a conclusion that a book taken from these sources is obscene? Reason and authority would require that the question be answered in the negative.

The case of *United States v. Bennett,* 24 Fed. Cases. 14571, answers the question in this manner when the court says:

> "In commenting on one of the passages which he read, the counsel for the defendant stated that he desired to read from another book, a clause of similar character, by way of showing 'how that sort of illustration or expression or narrative is regarded in standard literature.' The court excluded all reference to and illustrations from other books and publications, and the defendant's counsel excepted. We are unable to see that there was any error in their exclusion. It is the duty of the court to prevent the presentation to the jury of any issues other than the one on trial, and it did not tend to show that the marked passages in question was not obscene, that another passage in the book from which the marked

passage was quoted, or another passage in some other book, was not generally accepted as abscene."

This Court considered the question raised upon this appeal in *Schindler v. United States,* 208 F. 2d 289, cert. den. 347 U. S. 938. Therein this Court says, at page 290:

> "Another book, called 'The Perfumed Garden,' was likewise excluded although it contained source material for the Arabian Manual. However its relevancy, if any, was too slight to render its exclusion prejudicial. The primary tendency of the excluded material was to clutter up and confuse the record, and we think the exclusionary ruling was well within the discretion of the trial judge."

There Was No Error in the Ruling of the Trial Court Refusing to Admit the Testimony of J. B. Tietz, Esq. on the Question of Intent.

This raises a question which was decided by this Court against this same appellant in the case of *Schindler v. United States,* 208 F. 2d 289, 290, cert. den. 347 U. S. 938, and therefore is not considered in this appeal.

There Was No Error in the Instructions of the Trial Court on Criminal Intent.

The trial court instructed the jury on the question of criminal intent as follows:

> "In every crime there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.
>
> A person is held to intend all the natural and probable consequences of acts knowingly done. That is to say, the law assumes a person to intend all the

consequences which one standing in like circumstances and possessing like knowledge should reasonably expect to result from any act which is knowingly done.

An act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason.

The word 'willfully' does not mean merely voluntarily or intentionally. Doing or omitting to do a thing knowingly and willfully implies not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it. It signifies an evil intent without justifiable excuse and is employed to characterize a thing done without ground for believing that it is lawful or conduct marked by careless disregard whether or not one has the right so to act." [R. p. 61, line 17, to p. 62, line 12.]

And further,

"A picture or printed matter is obscene, lewd lascivious or filthy within the meaning of the Statute that applies to this case if it is offensive to the common sense of decency and modesty of the community, and tends to suggest, or arouse sexual desires or thoughts in the minds of those who by means thereof may be depraved or corrupted in that regard. The true inquiry in this case is whether or not the literature charged to have been obscene was, in fact, of that character. And, if such literature was obscene, and the defendant knew of the contents of such literature at the time he deposited the same in the mails, or caused the same to be deposited in the mails, it is not material that he, himself, did not regard such literature as obscene." [R. p. 62, line 23, to p. 63, line 10.]

Appellant's specification of error herein relies upon the case of *Morissette v. United States,* 342 U. S. 246. It is difficult upon a study of the *Morissette* case (*supra*) to see how appellant can find much comfort in the language and holding of that case.

At the outset it should be remembered that appellant through his counsel stipulated that he "did deposit and cause to be deposited for mailing" the material charged in the indictment. How, then, can he now complain that any other evidence on the question of intent is relevant or material? It could add nothing to the effect of the stipulation.

Further, it is submitted that the *Morissette* case *(supra)* is not applicable to the statute or situation here in question. The court in the *Morissette* case *(supra)* says at page 260:

> "A quite different question here is whether we will expand the doctrine of crimes without intent *to include those charged here."* (Emphasis added.)

From the language quoted above, it would appear the court was concerned only with the statute under attack in that particular case. That was a theft statute, 18 U. S. C., Sec. 641. The cases interpreting the necessary intent required by the statute involved in the instant case have uniformly held that knowledge *of the obscenity* of a book was *not* a necessary element to a violation of 18 U. S. C., Sec. 1461. *Rosen v. United States,* 161 U. S. 29; *Magon v. United States,* 248 Fed. 201, cert. den. 249 U. S. 618; *Burton v. United States,* 142 Fed. 57; *Knowles v. United States,* 170 Fed. 409. The necessary intent is merely the intent to mail the article mailed. This was stipulated by the appellant.

This Court considered and rejected appellant's theory in *Schindler v. United States,* 208 F. 2d 289, cert. den., 347 U. S. 938. In the *Schindler* case, this Court, at page 290, says:

> "Probably the leading case bearing on the point is Rosen v. United States, 161 U. S. 29, 41 S. Ct. 434, 438, 480, 40 L. Ed. 606. There the defendant unavailingly asked the court to instruct the jury that he should be acquitted if they entertained a reasonable doubt whether he knew that the application he had placed in the mails was obscene. The request, said the Supreme Court, was intended to announce the proposition that a conviction under the statute could not be had unless the individual charged with violation of it knew or believed that the paper he deposited could be properly or justly characterized as obscene or lewd. 'The statute,' said the Court, 'is not to be so interpreted.' And the Court went on to observe that Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge of its contents, assumed the responsibility of putting it in the United States mails. The authorities appear uniformly to support that view."

The trial court properly instructed the jury upon the question of the criminal intent necessary to convict the appellant and therefore, the judgment should be affirmed.

Section 1461 of Title 18, United States Code is Constitutional.

Appellant attacks Section 1461 of Title 18, United States Code as an unwarranted abridgement of rights guaranteed under the First Amendment of the Constitution of the United States. He primarily bases his attack upon the theory that the statute punishes acts

which are of no danger to "the safety of the nation." He claims a lack of a "clear and present danger."

It must be conceded at the outset that Congress was vested with the power "to establish post-offices and post roads." United States Constitution, Article I, Section 8, clause 7. As practically construed throughout the cases, this authorizes, not merely the establishment of a postal system, but also its regulation and protection. However, with this express grant of power must also be construed the limitations upon Congress in the enactment of laws "abridging the freedom of speech and of the press." United States Constitution, Amendment I.

The problem has been raised in a great number of cases. The Supreme Court in the case of *Ex parte Jackson,* 96 U. S. 727, was first presented with the question in regard to lottery tickets. The court in the *Jackson* case *(supra)* says at page 736:

> "In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals. Thus by Act of March 3, 1873 Congress declared 'that no obscene, lewd, or lascivious book, pamphlet . . . shall be carried in the mail; . . .'
>
> All that Congress meant by this Act was, that the mail should not be used to transport such corrupting publications and articles, and that anyone who attempted to use it for that purpose should be punished . . . The only question for our determination relates to the constitutionality of the Act; and of that we have no doubt."

In construing a statute in substantially the same language as Section 1461 of Title 18, the court in the case

of *Tyomies Publishing Co. v. United States,* 211 Fed. 385, says at page 388:

> "The statute is not in derogation of the constitutional rights and privileges of the defendants as publishers of a daily newspaper. The constitutional guaranty of a free press cannot be made a shield from violation of criminal laws which are not designed to restrict freedom of the press, but to protect society from acts clearly immoral or otherwise injurious to the people. *Ex parte Jackson,* 96 U. S. 727, 736, 24 L. Ed. 877; *In re Rapier,* 143 U. S. 110, 133, 134, 12 Sup. Ct. 506, 24 Sup. Ct. 789, 48 L. Ed. 1092; *Knowles v. United States,* 170 Fed. 409, 411, 95 C. C. A. 579; *United States v. Journal Co.* (D. C.), 197 Fed. 415, 418."

Appellant also attacks Section 1461, Title 18, United States Code as indefinite. This statute was considered by this court in *Magon v. United States,* 248 Fed. 201, cert. den. 249 U. S. 618. The court in the *Magon* case *(supra),* in discussing the problem of indefiniteness, says at page 203:

> "In construing the word 'obscene' as used therein, it has been uniformly held that if the matter complained of were of such a nature as would tend to corrupt the morals of those whose minds are open to such influences by arousing or implanting in such minds lewd or lascivious thoughts or desires it is within the prohibition of the statute, and that whether or not it had such tendency was a question for the jury. *Rosen v. United States,* 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Knowles v. United States,* 170 Fed. 409, 95 C. C. A. 579; *United States v. Bennett,* 24 Fed. Cas. No. 14,571; *McFadden v. United States,* 165 Fed. 51, 91 C. C. A. 89; *Denollin v. United States,* 144 Fed. 363, 75 C. C. A. 365;

United States v. Musgrove (D. C.), 160 Fed. 700; *United States v. Harmon* (D. C.), 45 Fed. 414; *United States v. Clarke* (D. C.), 38 Fed. 732.

". . . A defendant charged with sending indecent matter through the mails is therefore, . . . in the same position that a defendant charged with sending obscene matter has always been in, and there is no more reason for holding the statute void as to the one than as to the other."

See also:

Verner v. United States (9th Cir.), 183 F. 2d 184.

The constitutionality of the statute here in question has also been discussed and upheld in such cases as the following: *Harmon v. United States,* 50 Fed. 921; *Rinker v. United States,* 151 Fed. 755; *Knowles v. United States,* 170 Fed. 409; *Coomer v. United States,* 213 Fed. 1. See also: *Besig v. United States,* 208 F. 2d 142.

The Verdict of the Jury Is Sustained by the Evidence.

Since appellant stipulated to the fact of mailing the books as charged in the Indictment, the sole question for the jury was whether or not the books were in fact obscene. *Rosen v. United States, supra; Burstein v. United States,* 178 F. 2d 665. On this question the books themselves were introduced into evidence.

The jury was given an opportunity to read and decide the question of obscenity under proper instructions by the trial court. This question of fact the jury decided against the appellant. A mere perusal of the books involved here would indicate the jury was correct in returning a verdict against the appellant.

See *Besig v. United States, supra.*

VI.
CONCLUSION.

There were no errors of law in the rulings of the trial court. Section 1461, Title 18, is constitutional. Therefore, it is respectfully submitted that the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant United States Attorney,
Chief of Criminal Division,

MANUEL L. REAL,
Assistant United States Attorney,

Attorneys for Appellee.